FILED
JUN 18 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM,

NO. 79-1388

KARL J. KIRCHBERG,

Appellant

versus

JOAN PAILLOT FEENSTRA,

Appellee

versus

EDWIN W. EDWARDS and STATE OF LOUISIANA

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

MOTIONS ON BEHALF OF APPELLEES EDWIN W. EDWARDS AND THE STATE OF LOUISIANA SUGGESTING THAT THE CAUSE IS MOOT AND A MOTION TO DISMISS

WILLIAM J. GUSTE, JR.
Attorney General
KENDALL L. VICK
Assistant Attorney General
LOUIS M. JONES
Assistant Attorney General
RONALD C. DAVIS
Assistant Attorney General
EAVELYN T. BROOKS
Staff Attorney

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1388

KARL J. KIRCHBERG,

Appellant

versus

JOAN PAILLOT FEENSTRA,

Appellee

versus

EDWIN W. EDWARDS and STATE OF LOUISIANA

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

MOTIONS ON BEHALF OF APPELLEES EDWIN W. EDWARDS AND THE STATE OF LOUISIANA SUGGESTING THAT THE CAUSE IS MOOT AND A MOTION TO DISMISS

Pursuant to Rule 16 and Rule 41(5) of the Rules of this Court, through the undersigned Assistant Attorney General of the State of Louisiana, appellees Edwin W. Ed-

wards and the State of Louisiana move this Honorable Court to dismiss the appeal in the above entitled and numbered cause of action for the following reason, to wit: Article 2404 of the Louisiana Civil Code, the constitutionality of which is at issue in this Court, has been repealed by the Louisiana Legislature by Act 709 of 1979, thereby rendering appellant's claim moot.

STATEMENT OF THE CASE

The relief requested by appellant is that this Court reverse the decision of the Fifth Circuit Court of Appeals and declare that Article 2404 of the Louisiana Civil Code is constitutional according to the Fourteenth Amendment of the United States Constitution, or, in the alternative, to find that the decision of the Fifth Circuit Court of Appeals should be applied prospectively only, and not to appellant, Karl J. Kirchberg.

Karl J. Kirchberg filed suit in Louisiana state court to foreclose on a mortgage he held on the home of appellee Joan P. Feenstra. The mortgage was executed by Mrs. Feenstra's husband. Mrs. Feenstra opposed the foreclosure arguing that Kirchberg violated the Truth in Lending Act, 15 U.S.C. Sec. 1601, *et seq.* Kirchberg then sued for declaratory judgment in United States District Court that he had not violated the Act. Mrs. Feenstra counterclaimed that the mortgage was invalid because appellant violated the Truth in Lending Act and because the Louisiana law, which permitted the mortgage with only the husband's signature, violated the equal protection and due process clauses of the Fourteenth Amendment. The State of Louisiana was made a third party defendant in Mrs. Feenstra's counterclaim of unconstitutionality.

The United States District Court for the Eastern District of Louisiana granted the State's motion for summary judgment. 430 F.Supp. 642.

Mrs. Feenstra appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals found that Louisiana Civil Code Article 2404 violated the equal protection clause of the Fourteenth Amendment, and reversed. 609 F.2d 727.

Kirchberg appealed the decision of the Court of Appeals to this Court.

After the District Court judgment but before the Court of Appeals' decision, Article 2404 of the Louisiana Civil Code was repealed by the Louisiana Legislature by Act 709 of 1979. By Act 709, the Legislature enacted a complete revision of Louisiana's community property system and repealed all Louisiana laws inconsistent with the new community property regime, including all of Louisiana Civil Code Title VI, "OF THE MARRIAGE CONTRACT, AND OF THE RESPECTIVE RIGHTS OF THE PARTIES IN RELATION TO THEIR PROPERTY."

The new system became effective January 1, 1980. It rejects the "head and master" management concept that formerly was the basis of Louisiana's community property system.

The new system is based on the principle of "equal management", as mandated by Senate Concurrent Resolution No. 54 of 1977. That resolution declared "adoption in principle of 'equal management' of community property by

each spouse; to authorize and request the Senate Committee on Judiciary, Section "A" and the House Committee on Civil Law and Procedure to create a joint subcommittee to draft proposed bills necessary to implement that concept and to create an advisory committee to assist the joint subcommittee." The resolution further resolved "that the proposed bill, in order to accomplish the purposes of this Resolution, shall include a provision to the effect that each spouse shall have the right to manage, control, and dispose of community property, except where specifically provided otherwise in the proposed bill."

ARGUMENTS OF LAW

MOOTNESS

Determining what kind of events will moot a suit on appeal has been a longstanding and complex problem. *See* generally, Note, Harv. L. Rev. 1672 (1970) and Monaghan. *Constitutional Adjudication: The Who and When,* 82 Yale L. J. 1363, 1383 (1973).

The general rule governing federal appellate or certiorari review is that "an actual controversy must exist at . . . these stages . . . and not simply at the date the action is initiated.". *Roe v. Wade,* 410 U.S. 113, 125 (1973); *Ellis v. Dyson,* 421 U.S. 426 (1975); *United States v. Munsingwear, Inc.,* 340 U.S. 36 (1950). Exceptions are considered in rare circumstances where the case presents a question that is "capable of repetition, yet evading review", *Roe v. Wade,* 410 U.S. 113, 125.

This Court has been less willing to entertain cases

brought against governmental entities than where the actions sought to be enjoined are done by private persons and where the risk of recurrence of voluntarily ceased activities remains real. *United States v. W. T. Grant,* 345 U.S. 629 (1953); *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199 (1968).

This Court refused to consider an appeal in which appellant's anticipation of a recurrence of the dispute "affords no basis for the suggestion that the case . . . present(s) any possible subject for judicial action". *Commercial Cable Co. v. Burleson,* 250 U.S. 360, 362 (1919).

Such anticipations are "merely speculative". *Street Employees Div. 1287 v. Missouri,* 374 U.S. 74, 78 (1963).

Appellant's request should likewise be denied. Louisiana Civil Code Article 2404, which appellant seeks to have declared constitutional by this Honorable Court, was repealed by Act 709 of 1979 by the Louisiana Legislature. The repeal became effective January 1, 1980.

Dealing with a similar instance in *Roth v. Delano,* 338 U.S. 226, 231 (1949), this Court stated:

> ". . . there is a further reason why we should not now decide the principal question. Michigan has repealed Act No. 170 by Act 329, Public Laws of Michigan for 1947, reserving, however, from the effect of the repeal any 'pending suit or proceeding.' A possible consequence is that no new suit or proceeding could be maintained to enforce the repealed Act. Thus, to now decide this suit for a declaratory judgment might be to render an ad-

> visory opinion on the constitutionality of a repealed State Act. And, of course, a State cannot by reservation, any more than by affirmation, confer upon us the power or impose upon us the duty to render an advisory opinion."

Louisiana Act 709 of 1979 also implemented a new Louisiana community property system which became effective on January 1, 1980. Article 2346 is the new article of the Louisiana Civil Code providing the general management rule of the new community property system. It provides that "Each spouse acting alone may manage, control, or dispose of community property unless otherwise provided by law." The enactment of this article signifies Louisiana's rejection of the "head and master" management system in favor of the general principle of "equal management".

Article 2347 specifically applies to immovable property, including the family home, and provides that:

> "The concurrence of both spouses is required for the alienation, encumbrance, or lease of community immovables, furniture or furnishings while located in the family home, all or substantially all of the assets of a community enterprise and movables issued or registered as provided by law in the names of the spouses jointly."

It is in this form that the Louisiana community property system must be reviewed. This Honorable Court stated in *Hall v. Beals,* 396 U.S. 45, 48 (1969) that:

> "...the recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in

> light of the Colorado statute as it now stands, not at it once did . . ."

Articles 2346 and 2347 are not sexually discriminatory. They are not unconstitutional as violative of the Fourteenth Amendment of the United States Constitution. The general management rule grants equal power to each spouse to act alone in the management of the community property; article 2347 applies to specific transactions deemed by the Louisiana Legislature to be of such importance to the family that the concurrence of both spouses is necessary in order to render such transactions valid.

Pursuant to the *present* Louisiana law, appellant could not have obtained a valid mortgage on the Feenstra family home without the consent of Mrs. Feenstra. Nor can any married person of either sex who is subject to Louisiana's law alienate, encumber or lease community immovable property. Thus, the act done under authority of a Civil Code article found to be unconstitutional by the Fifth Circuit Court of Appeal is not "capable of repetition, yet evading review" so as to warrant this Honorable Court's review of this action as it did in *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969).

This Court stated in *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199, 203 (1968) that:

> "...A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur . . ."

Unlike the situation in *United States v. Concentrated Phosphate Export Association*, supra, the alleged constitutional action complained of in this case will not recur because of State Legislative action not because of a "voluntary cessation".

The only remaining question raised by appellant in this appeal is:

> "Does the Decision rendered by the Fifth Circuit Court of Appeals apply to Karl J. Kirchberg, thus preventing the Civil Sheriff of Orleans Parish from seizing the Feenstra home, or is the decision prospective only in that the holding does not apply to Kirchberg, and therefore he can proceed to enforce the mortgage and have the Feenstra home seized and sold?"

Appellant is, in effect, asking this court to clarify the meaning of the judgment of the Court of Appeals. The Court of Appeals has continuing power to accept and pass upon a petition to clarify an outstanding mandate, to declare what it meant by its' mandate, and to change the mandate. *Dickerson v. Continental Oil Company,* 476 F.2d 635 (5th Cir. 1973); *Meredith v. Fair,* 306 F.2d 374 (5th Cir. 1962); *National Comics Publications v. Fawcett Publications,* 198 F.2d 927 (2nd Cir. 1952).

CONCLUSION

Appellees respectfully submit that the constitutional issue presented by appellant in this appeal is moot. *Roth v. Delano,* 338 U.S. 226 (1949); *Hall v. Beals,* 396 U.S. 45 (1969).

Appellees also respectfully move that this appeal be dismissed as a matter of right, *United States v. W. T. Grant Company, 345 U.S. 629 (1953).*

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL

LOUIS M. JONES
ASSISTANT ATTORNEY GENERAL

RONALD C. DAVIS
ASSISTANT ATTORNEY GENERAL

EAVELYN T. BROOKS
STAFF ATTORNEY

BY: _____

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
234 LOYOLA AVENUE, 7TH FLOOR
NEW ORLEANS, LA 70112
PHONE: (504) 568-5575

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid this _____ day of _____, 19_____.

BY:_____